Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

MICHAEL KOBOLD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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March 7, 2005

QUESTIONS PRESENTED FOR REVIEW

WHETHER THE APPEALS COURT ERRED IN NOT FINDING CO-DEFENDANT'S FINAL ARGUMENT SO PREJUDICIAL AS TO COMPEL THE GRANTING OF A NEW TRIAL

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OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit in this matter is an unpublished opinion under the following caption: *United States v. Kobold*, Case No. 04-1800, and is contained in the appendix as A.1. The decision was issued 23 December 2004.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Third Circuit, was rendered on 23 December 2004. This Petition is within 90 days thereof [Supreme Court Rule 13]. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOKED

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Michael Kobold was charged by an Indictment returned by a Grand Jury sitting in the Western District of Pennsylvania and charged with a violation of 18 U.S.C. §1001(a)(2) [False Statement], that is alleged to have occurred on 8 December 2002.

A Superseding Indictment was later returned adding William J. DeForte as a Co-Defendant. The charge against Mr. Kobold remained the same, while Mr. DeForte was charged with two (2) counts of violating 18 U.S.C. §1001.

Mr. Deforte filed, and argued, a Motion for Severance, which was denied and the matter was tried to a jury.

After conviction, an appeal was undertaken, and the conviction was affirmed.

As the Appellate decision notices, Petitioner's trial counsel failed to make any judgment of acquittal Motions or objections to what was offered to be prejudicial argument, hence the matter proceeded on a plain error review.

STATEMENT OF FACTS

Petitioner will present a summary of each witness called to supplement the factual presentations of the Appeals Court.

The first witness called by the Government was Homeland Security Agent John Rupchis, who was assigned to the Pittsburgh International Airport supervising the processing of the international flights that would leave the airport.

Due to certain restrictions imposed after September 11, 2001 passengers only were allowed to travel to the airside terminal for departure. Rupchis and his unit conduct investigations at the airside terminal, including examining suitcases and travel documents.

As the agent was observing the flights departing for Frankfurt, he saw two males embrace, then saw one of the men walk to the gate entrance while the other was apparently trying to leave the terminal area. Since only ticketed passengers were allowed in that area, the agent decided to investigate, and confronted the individual seeking both his ticket and identification information.

That person was the Petitioner, and in response to the inquiry for ticket and passport he produced a law enforcement badge bearing number 1376, a state constable shield for the State of Pennsylvania. Mr. Kobold then allegedly said, "I am with the State... I'm a law enforcement officer ... I'm a PA constable", to which the agent asked for the credentials that went with the badge. Petitioner advised Inspector Rupchis that he had lost that identification the previous week during an arrest and he also lost his Pennsylvania driver's license. He did later produce a German driver's license and he also had a Florida license.

Petitioner advised he knew the port director, and that he was accompanying his brother, a recovering drug addict, to make sure he got on the plane to Germany.

Due to the asserted constable status and the conflicting German driver's license the inspector called in the Allegheny County Police to assist him.

Sergeant Olshinsky was among those to respond.

During discussion with Petitioner the inspector learned that Mr. Kobold had had access to the airside terminal a week or so earlier to pick up a shipment of watches. Mr. Kobold is a watchmaker and he imports watches, and he used his constable badge on 3 December to retrieve a shipment.

Special Agent Nicoloff from Homeland Security took up the investigation.

During the entire time Inspector Rupchis was in Mr. Kobold's presence, including with the other police, Petitioner insisted he was a constable.

After conversations, Petitioner advised the policeman he was with Mr. DeForte, the elected constable of Findlay Township, and that Mr. DeForte had given him his badge as Mr. Kobold lost his during the arrest.

Mr. Kobold told of his assistance in making arrests with Constable DeForte.

Constable DeForte then, at the request of the police, came to the airport station. Mr. DeForte returned with a letter stating that that badge was given to the Petitioner in apparent appreciation, "for his manufacture of watches for law enforcement" and that it was a memento, not a "functional law enforcement credential". Then, according to the policeman, the Petitioner told him that he had assisted DeForte in various functions but was not a constable.

Chief Payne was the next witness. He is chief of the Borough of Pitcairn, but was for a period of time a sergeant with the Carnegie Mellon University Police [hereinafter sometimes for brevity (CMU)].

In February of 2002, some ten months earlier, while at CMU, he received a communication of an incident at a sorority [Donner House] regarding a suspicious person looking for one of the sisters. This person was someone that identified himself as a constable and turned out to be Petitioner.

Petitioner met with the chief who explained to him he could not impersonate a policeman even if it were to locate his girlfriend. Mr. Kobold described in detail that he was part of the fugitive task force with the constable. He also advised that Mr. DeForte was training him to be a constable and he told the chief of the procedures he was learning.

Detective Miller of the Allegheny Police Department also testified he worked on the airport incident, and decided to file county charges against Petitioner; he arrested him at his office. From there he was taken to the police station where he waived "Miranda" and authored a written statement, wherein he advised he received an honorary badge from DeForte and he used it to gain access to the air side terminal. He advised the badge was a gift. Petitioner called DeForte from the jail told him of the arrest and told him, "he loved him".

Petitioner also had conversations on December 8 with Officer Hoffman regarding his being a "special constable" with Bill DeForte. Mr. DeForte came to the airport and had conversations with the police after Petitioner suggested that Hoffman call to confirm Petitioner's status with Mr. DeForte.

Jay Smith of H.A. Smith and Sons uniforms also became a Government witness, and besides uniforms, his business sold law enforcement badges. On 26 June 2002 DeForte and Petitioner came into his store to buy badges, particularly constable badges.

DeForte introduced Kobold as his deputy constable. DeForte showed his constable identification and ordered a badge. Two badges were ordered, and a deposit was left; the balance later was paid by Petitioner's Visa card. The names on the badges were to be M. Kobold and M. Mikutta.

Mr. Kobold, when he picked up these badges, ordered two more, one M. Kobold with the number 1376 and one with the name R. Fiennes. Smith was adamant that he ordered the badges in the first instance because DeForte made it clear Kobold was his deputy.

The first defense witness was Klaus Kobold, the Petitioner's father, who develops and manufactures instruments and owns several companies worldwide, including one in Pittsburgh. In the fall of 2001, Petitioner told

him in a phone conversation he was going to be a police agent, his new close friend was a police agent and Petitioner wanted to be the same. The father was opposed. Later, he received a call that his son was now a police agent, arranged by his friend Bill.

Mr. Kobold had the discussion again in Florida with the Petitioner, expressed his fear for the son's safety but Petitioner stated "Bill" had trained him. During the next spring break both Petitioner and DeForte went to the Kobold home in Fort Lauderdale and stayed one week, with Mr. DeForte assuring Mr. Kobold of Petitioner's status as a deputy and his participation in arrests, detailing some aspects.

Mr. Kobold expanded on Petitioner's anti-terrorist driving courses and explained about Markus Mikutta, a friend of Petitioner's that went to the University of Miami, but also stayed with DeForte.

The defense also called William Crowell, the elected constable for the Reserve Township. He previously worked for DeForte as a deputy constable. He met Kobold as they were on their way to McKeesport to make an arrest, when "they" pulled into a plaza, and Crowell got into the back seat of the vehicle DeForte was driving, Petitioner got into the front seat and was handed a gun and badge by DeForte. The badge was placed around his neck or a chain. An arrest was made, Kobold participated, even going to the jail. Crowell also went another time with Petitioner, again going to the jail after the arrest.

DeForte asked Crowell to lie about these incidents.

Michael Kobold became a witness on his own behalf. He graduated from CMU, however even before that he was already in the custom watch business, designing same and in fact owned Kobold Watch Company. He was employed by his father's company as well.

He met DeForte at a sushi bar in 2001, and the two, as noted, became very good friends.

After a period of time, since due to his lack of citizenship he could not yet become a full deputy he was made a special deputy, and at some point he began to assist DeForte. He got further involved in assisting DeForte who assured him his actions were legal.

DeForte told him, due to his increased activity he needed a weapon, and he also got his own badge.

Petitioner explained his months as a special deputy leading to the day at the airport.

Mr. Kobold showed his badge to the Huntleigh employees at the gate and was permitted to go curbside with his brother. Petitioner firmly believed he was a deputy constable. Petitioner called DeForte to come to the airport after his detention, as he felt he was a deputy.

DeForte demanded that Petitioner return all police related paraphernalia.

Mr. Kobold related how DeForte introduced him as a constable, and they used their badges to get discounts.

He emphasized he did not lie when he told the authorities on 8 December that he was a constable as he believed he was and he stated he did not lie about the driver's license or identification and explained it fully, including the three drivers licenses he possesses.

He acknowledged that he had conversations with DeForte where he offered to help him out financially due to his situation particularly if he were to come forward for Petitioner with what Petitioner stated were true facts.

Mr. DeForte also presented a number of witnesses to show various scenarios in obtaining badges and other accessories of the constable job. This included several

witnesses that went on "ride alongs". Also called as a witness was William Fabus, the owner of the Bullseye Shooting Range that Kobold and DeForte frequented for pistol and target shooting, but not "tactical shooting". And, the Co-Defendant DeForte also called an attorney/solicitor for the constable of Findlay County, Lawrence Bolind, to establish the ease to buy a badge from a supply company, as he did with a flight attendant Ms. Rickabaugh.

James Miller, a full time constable, spoke of meeting Kobold and Mr. Mikutta during a ride along where both supposedly said they were German police agents, although the defense attorney did raise issues as to the motive for Mr. Miller to testify.

Mr. DeForte also testified, and denied any of the allegations contained in the indictment, stating he gave Petitioner one badge as a memento and if, "Michael Kobold had any other badges, he obtained them on his own, and purchased them on his own" and further denied on direct examination everything Mr. Kobold had said regarding his being a special deputy. He explained the badge purchases, denying any knowledge of them and claimed a lack of knowledge of what Kobold was doing.

As noted, the Third Circuit upheld the conviction in spite of the argument of prejudicial argument by counsel, and in the face of a sufficiency of the evidence challenge as, inter alia, the Petitioner's trial counsel failed to preserve the issues he raised on appeal, and the Court, citing to *Massaro v. United States*, 538 U.D. 500 (2003) determined not to consider any ineffectiveness claims.

What is interesting in this is that counsel for the Co-Defendant Mr. DeForte apparently felt he could not receive a fair trial if put before a jury with Mr. Kobold. To avoid that, he moved for a severance, which, after hearing was denied.

In actuality, going to trial with Mr. Kobold provided the ammunition for his acquittal.

REASONS FOR GRANTING THE WRIT

THE APPEALS COURT ERRED IN NOT FINDING CO-DEFENDANT'S FINAL ARGUMENT SO PREJUDICIAL AS TO COMPEL THE GRANTING OF A NEW TRIAL

Mr. Kobold; the scion of a wealthy German industrialist is a well mannered, with a slightly British twinge to his accent, having been schooled in various places. He did not come across as the "kid next door".

DeForte was portrayed as the "poor soul", enamored with Mr. Kobold, fascinated by and the recipient of the family wealth, and otherwise a "victim" of the recent college graduate.

As he stated in the Appellate Court, the undersigned is the first to concede that it was great trial strategy, and since no objections were being offered, even during DeForte's cross of witnesses or Petitioner, it went on without checks.

However one may characterize the cross examination, the final argument, it is submitted, crossed the line to the degree that a new trial should be ordered.

Petitioner submits to this Court that he has a fundamental right to a fair trial. Were it a prosecutor that made the final arguments or the remarks during cross examination that DeForte's attorney made, Petitioner would image the Court would find fundamental error even if trial counsel did not object.

The Co-Defendant's counsel based his entire argument not only upon the veracity and "being" of the Petitioner, but also upon his heritage, citizenship and his friendships. An example of the argument:

So as I think about creating a doubt, let's take it to the stuff that there is absolutely no doubt.

If this were the premise of whether or not we would jump into the water, splash, what would be in the water. There is no doubt in our mind that what Agent Rupchis told us is a fact. There's no doubt Michael Kobold told him he was a Pennsylvania constable. There's no doubt he took out that badge and produced it. There is no doubt in our mind that in a 48-hour period, Mr. Kobold told a half dozen different scenarios. There's no doubt about that.

There can't be a variant, I'm a Pennsylvania constable, assistant constable. When is the only time he told the truth? Stop and think of the testimony now. The only time he told the truth about whether or not he's a constable is when he is told Bill DeForte is coming out there. That's the only time. That's told to us by Detective Olshinsky, the second police officer, and he is told I lost my ID, I lost my Pennsylvania driver's license.

Come on. Do you have your driver's license. We know what we're talking about. We're not talking about your driver's license from anywhere but where you have lived the last five years. I lost my driver's license. I lost my identification. What identification? He had identification you made at home on your computer. I lost that.

Throughout this testimony I had the incredible experience of hearing how lies aren't lies. I told him I lost my identification, but I really didn't lose my identification. I told him I was a constable. I didn't really think I was a constable.

Everything that Michael Kobold has said has an explanation to it. The explanation is no better than that first statement, but by the time we get to our second detective, when we get through Rupchise, when we get to Olshinsky, it's a repeat, it's a reaffirmation of the lies.

We're going to contact the constable's association. Well, this is really not my constable's badge. Immediately retreat. Why? Because this young man is so used to, so accustomed to telling bizarre stories and having people believe them. This was just another one, another story.

The case in point — let me just digress for a minute. I'm from Germany. In Germany we trust our police officers. Our police officers would never lie. Maybe I didn't do real well in history, but that certainly isn't my knowledge of what German officials are like, but nevertheless, we have the greatest respect for our police officers. They wouldn't lie. Yet I demand discounts. I'm offended I didn't get preferential treatment.

I give a badge to my girlfriend so if she gets stopped, she could throw her weight around with the police. I just love policemen. No sense whatsoever. That's throughout his testimony. It's repulsive. It's arrogant. It's pompous. It's based on the premises that you're idiots. You are being — whomever you are speaking to if it's his father, Mr. Dambier, his stepmother, if it's Rupchis, if it's Olshinsky, they're idiots. He's smart. That kind of pomposity runs rampant in his testimony.

> Now he has just attempted to get through security — stop and think of that. Airport security. I wanted to cry, my heart broke so at his story. It was important to see that my brother got to the plane without being accosted by the nefarious drug dealer. He just left Los Angeles. He just flew from the Los Angeles Airport into Greater Pittsburgh Airport. He wasn't concerned there.
>
> We didn't take him up to the ticketed station and go through, which only ticketed passengers can access, we didn't take him up there and let the drug dealers in Pittsburgh buy tickets so they can get through there and get you on the other side.

Of course, the leading case is now the instructive decision of the this Court in *Zafiro v. United States*, 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed. 2d 317 (1993), wherein the Court observed:

> We believe that, when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of

> prejudice is heightened. *See Kotteakos v. United States*, 328 U.S. 750, 774-775, 66 S.Ct. 1239, 1252-1253, 90 L.Ed. 1557 (1946). Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice. *See Burton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. *See, e.j. Tifford v. Wainwright*, 588 F.2d 954 (CA5 1979) (*per curiam*). The risk of prejudice will vary with the facts in each case, and district courts may find prejudice in situations not discussed here. When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but, as we indicated in *Richardson v. Marsh*, less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice. See 481 U.S. at 211, 107 S.Ct., at 1709.

Petitioner respectfully submits that while no objections or Motions were ever made, the Petitioner's conviction was a "manifest injustice" suffered at the hands of a Co-Defendant. This is not merely an allegation that the Petitioner would have had a "better chance of acquittal at a separate trial" Id. at 938, but rather is an instance of a prosecutorial onslaught by a Co-Defendant. Indeed, as Justice Stevens wrote in the Zafiro concurring opinion:

> There will, however, almost certainly be multidefendant cases in which a series of separate trials would be not only more reliable, but also more efficient and manageable than some of the mammoth conspiracy cases which the Government often elects to prosecute. And in all cases, the Court

> should be mindful of the serious risks of prejudice and overreaching that are characteristic of joint trials, particularly when a conspiracy count is included in the indictment. Justice Jackson's eloquent description of these concerns in his separate opinion in *Krulewitch v. United States*, 336 U.S. 440, 454, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949), explains why there is much more at stake here than administrative convenience. See also *United States v. Romanello*, 726 F.2d 173 (CA5 1984).

It is respectfully submitted the decision of the Appellate Court is such that the Petitioner, ought be granted certiorari.

He was denied due process of law, and a fair trial due to the actions of the Co-Defendant and a new trial, after review, should be ordered.

CONCLUSION

For all of the foregoing, a writ of certiorari ought issue to the United States Court of Appeals for the Eleventh Circuit to review the per curiam affirmed, and enter whatever other orders are appropriate.

Respectfully submitted,

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United States Court of Appeals,
Third Circuit.
UNITED STATES of America,
v.
Search Term Begin Michael KOBOLD, Search Term End
Appellant.
No. 04-1800.
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Decided Dec. 23, 2004.

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Fred Haddad, Fort Lauderdale, FL, for Appellant.

Before NYGAARD, ROSENN, and BECKER, Circuit Judges.

OPINION OF THE COURT

ROSENN, Circuit Judge.

Defendant Michael Kobold ("Kobold") was tried to a jury in the United States District Court for the Western District of Pennsylvania, and convicted on one count of willfully making false statements, in violation of 18 U.S.C. ß 1001. On this timely appeal, Kobold raises three issues: (1) whether the evidence adduced at trial was sufficient to support his conviction; (2) whether he was unduly prejudiced by the closing statements of his co-defendant's counsel; and (3) whether his trial counsel rendered ineffective assistance by, *inter alia*, failing to move for a judgment of acquittal and failing to object to the closing remarks of co- defendant's counsel. We affirm the judgment of conviction and sentence imposed by the District Court.

I.

Because the facts are known to the parties and counsel, we briefly refer only to the salient facts pertinent to the issues raised. Kobold, born and raised abroad, was educated internationally. In 2002, he earned a bachelor of science degree in economics from Carnegie Mellon University, in Pittsburgh, Pennsylvania. Kobold operates a company that he founded, which designs and manufactures watches. He also works in his father's business, which designs and manufactures instruments for industrial applications. He also presides over a non-profit organization of his creation, the Kobold Foundation.

Although not a law enforcement officer, Kobold apparently has an interest in law enforcement. His conviction stems from his illicit use of a constable's badge to gain access to a secured area of the Pittsburgh International Airport reserved for ticketed passengers only. When questioned by a federal customs inspector about his presence in this area without a ticket, Kobold produced a Pennsylvania constable's badge, and responded that he was a Pennsylvania constable. He explained that he had recently lost his constable's identification and Pennsylvania driver's license in the course of making an arrest.

II.

Kobold concedes that he has failed to preserve his first two claims that: (1) the evidence was insufficient to sustain the jury's verdict and (2) the closing statements of codefendant's counsel were unduly prejudicial. Thus, we review these claims for plain error. *United States v. Powell*, 113 F.3d 464, 466-67 (3d Cir.1997); *United States v. Sandini*, 888 F.2d 300, 309 (3d Cir.1989). To demonstrate plain error, Kobold must show that: (1) there was an error; (2) the error was clear; (3) it affected "substantial rights"; and (4) it "seriously affect[ed] the fairness, integrity, or public

reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citations omitted). Kobold has not satisfied this burden.

We apply a particularly deferential standard of review when we consider whether a jury verdict is supported by legally sufficient evidence. *United States v. Dent*, 149 F.3d 180, 187 (3d Cir.1998). The evidence is viewed in the light most favorable to the government, and we will sustain the verdict if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* (quoting *United States v. Voigt*, 89 F.3d 1050, 1080 (3d Cir.1996), in turn quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)) (internal citation omitted). The evidence against Kobold, including his own admissions, is more than sufficient to support the jury verdict. It is undisputed that Kobold was never actually a constable or deputy constable. It is also undisputed that Kobold never possessed a Pennsylvania driver's license. At trial, Kobold admitted that he identified himself as a law enforcement officer, displayed his constable's badge, and explained that he lost his constable's identification while effectuating an arrest. Kobold denied telling the customs inspector that he had a Pennsylvania driver's license, but admitted that he falsely told the inspector that he misplaced his driver's license. Other evidence produced at trial, including the testimony of the federal customs inspector who questioned Kobold, amply supports the jury's guilty verdict. Further, because the jury was presented with sufficient evidence of Kobold's guilt, we reject his claim that he suffered undue prejudice as a result of the closing remarks of counsel for his co-defendant.

Kobold also argues that he received ineffective assistance of counsel. As a general rule, we will not entertain ineffective assistance of counsel claims on direct review. Rather, we "defer the issue of ineffectiveness of trial counsel to a collateral attack," so that the record can be adequately

developed with facts necessary to decide such claims. *United States v. Thornton*, 327 F.3d 268, 271 (3d Cir.2003); *see also Massaro v. United States*, 538 U.S. 500, 504-05, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003). Therefore, Kobold's ineffective assistance of counsel claim must abide the determination of the court in the event he raises it in a collateral proceeding pursuant to 28 U.S.C. § 2255.

For the foregoing reasons, we affirm the judgment of conviction and sentence. C.A.3 (Pa.), 2004. U.S. v. Kobold 118 Fed.Appx. 638, 2004 WL 2966504 (3rd Cir.(Pa.))